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No. 264

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, APPELLANT

v.

CHICAGO NORTH SHORE AND MILWAUKEE RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The United States District Court for the Northern District of Illinois rendered no opinion. Its findings of fact and conclusions of law (R. 47–65) have not been reported.

JURISDICTION

The decree of the District Court was entered March 24, 1932. (R. 65.) Petition for appeal was filed May 21, 1932, and allowed the same day. (R. 66, 68.) The jurisdiction of this Court rests on the Expediting Act of February 11, 1903, c. 544,

32 Stat. 823 (U. S. C., Title 49, Sec. 45), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTION PRESENTED

Section 20a of the Interstate Commerce Act makes it unlawful for any carrier subject to the Act "(except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation)" to issue securities or assume obligations without having obtained prior authorization therefor from the Interstate Commerce Commission. The sole question presented is whether appellee's railway, which is independently operated, is an "interurban electric railway" within the meaning of this exception.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 27–30.

STATEMENT

This is a suit under Section 12 (1) of the Interstate Commerce Act (*infra*, p. 27) to enjoin appellee from issuing any securities and from assuming any obligation or liability in respect of the securities of any other person without having first obtained from the Interstate Commerce Commission an order authorizing the issuance of such securities or the assumption of such obligation or

liability. (R. 1, 6–7.) The petition alleges that appellee, unless enjoined, will continue to issue its securities without obtaining authority from the Commission in violation of Section 20a of the Interstate Commerce Act. (R. 6.)

The District Court made extensive findings of fact concerning the nature of appellee's business and, upon these findings, concluded as a matter of law that appellee was an independently operated electric interurban railway excepted from the requirements of Section 20a. (R. 47, 64.) The decree dismissing the petition was entered (R. 65) prior to the decision of this Court in *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, construing the like exempting language of paragraph (22) of Section 1 of the Interstate Commerce Act.

Appellee is a corporation organized under the General Railroad Laws of the State of Illinois (Cahill's Revised Statutes, 1921, c. 114) and is a common carrier by railroad subject to certain sections of the Interstate Commerce Act. (R. 9, 48.) It is engaged in the general transportation of freight and passengers in interstate commerce over an electrified railroad between Chicago, Illinois, and Milwaukee, Wisconsin, consisting of 138.38 "route" miles of main-line track, 132.82 miles of second track, 42.60 miles of yard and other track, a total of 313.81 miles of all track. (R. 49, 50, 57–59.) Of the total route miles of track, only 14.66% represents tracks in city streets. (R. 50.)

Appellee's main terminals are in Chicago and Milwaukee. (R. 49.) In Chicago it operates over the tracks of the Chicago Rapid Transit Company from a point in the south side of the city to a point in the north side of the city, a distance of about 16 miles. (R. 49.) From the latter point appellee's line runs northerly for about 8 miles to Wilmette, Illinois, over elevated, dirt-fill tracks leased from the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and jointly used by the Rapid Transit Company. (R. 49.) From Wilmette to Milwaukee, a distance of about 68 miles, appellee operates over its own right of way, except for about 3 miles where its line in a few municipalities runs on public thoroughfares. (R. 49, 51.) In Milwaukee appellee operates a distance of 2.67 miles over the tracks of a company owned by it, the Chicago and Milwaukee Electric Railway Company. (R. 49.) Such operation is on the streets in common with vehicular traffic and is controlled in part by "stop and go" lights. (R. 49.)

The line between the north city limits of Chicago and the town of North Chicago is known as the "Shore line." (R. 49.) Appellee also operates a second line between these two points, west of and paralleling the Shore line, known as the "Skokie Valley line." (R. 49.) Appellee owns all of the right of way on this line. (R. 51.) In addition, appellee has two branch lines in Illinois, the total distance of which is about 12 miles. (R. 49.)

Appellee's tracks are standard gauge. (R. 50.) With the exception of 1.2 miles, all the line used for train operation upon appellee's own right of way is double-track and the line in Milwaukee is double-track. (R. 50.) The operation over the lines of the Chicago Rapid Transit Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company is double-track and multiple track. Of appellee's total owned tracks, only 2.4 miles are laid in paved streets, 0.197 mile is laid in unpaved portions of streets, and 2.8 miles are laid in unpaved street area, the track zone not being used for street purposes. (R. 50.)

From Waukegan north to Milwaukee the right of way averages about 100 feet in width. (R. 51.) South from North Chicago to the connection with the line of the Chicago Rapid Transit Company the right of way averages from 25 to 100 feet in width, the greater part being about 50 feet. (R. 51.) The right of way on the Skokie Valley line is wide enough to accommodate a four-track line. (R. 51.) Appellee has acquired part of its right of way through the exercise of the power of eminent domain. (R. 51.)

The bridges on appellee's line are built according to steam railway specifications and standards and are suitable for the operation of standard freight cars of steam railroads. (R. 51.) The carrying strength or load capacity of the bridges on appellee's owned main line will support the average steam railroad train. (R. 51.)

Appellee's tracks are physically connected with those of 4 steam railroads at 13 points, and it can and does interchange carload freight shipments with steam railroads at 8 different points. (R. 52.) It has interchange track connections (having a capacity of about 365 cars) with the Soo Line, the Elgin, Joliet and Eastern, the Chicago & North Western, and the Chicago, Milwaukee, St. Paul & Pacific, all steam railroads. (R. 52.) It has on its line 108 industry, team, and switch tracks at 37 stations, which serve about 40 different types of industry and the general public, and have a total capacity of 1,801 freight cars or 1,364 passenger cars. (R. 52, 53.) To increase its facilities for handling carload freight it has constructed more than 3 miles of side tracks into industrial yards and in 1930, 12 new industries located on its line. (R. 52.) It has 19 passing tracks, many of which are used as team or storage tracks, as well as for train passing, and its freight classification yards at Pettibone has a capacity of 161 freight cars. (R. 53.)

Appellee has a number of modern well-equipped passenger stations. (R. 53.) At 51 stations it maintains a station agent selling passenger tickets and performing the usual duties of a station agent. (R. 53.) At 96 other points it maintains shelters and platforms, at 35 points platforms only, and at 42 points, at which certain of its trains stop at streets or highways no facilities are provided. (R. 53.)

On the Skokie Valley and Shore lines electrical power is transmitted overhead, while on the tracks of the Chicago Rapid Transit Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad and on a small portion of appellee's owned tracks the current is fed by the third-rail system. (R. 54.) Appellee uses 600 volts, direct current, for its power. (R. 55.) This is the same voltage now used by the Pennsylvania Railroad for its entrance into and terminal operations at New York City, although the Pennsylvania is increasing its voltage. (R. 55.)

Appellee owns 7 electric locomotives. (R. 55.) They are lighter than those used on electrified sections of steam railroads and can not haul as many tons per train as steam railroads haul. (R. 55.) Appellee has within the past 5 years used steam locomotives owned by it for hauling revenue freight. (R. 55.) In transporting its less-than-carload merchandise despatch freight it uses a baggage type of passenger car, some of these cars being trailers, but most of them being equipped with motors. (R. 55.) It also owns and uses refrigerator cars similar to the motor merchandise despatch cars. (R. 55.) It owns 206 freight cars, of which 114 are interchangeable with steam railroads. (R. 55–56.) These 114 cars have no electrical equipment and are exactly the same as steam railroad freight cars in equipment, brakes, safety appliances, automatic couplers, and other devices.

(R. 56.) Appellee has 88 gondola cars, with a capacity of 80,000 ~~tons~~ lbs. or more, and its flat cars have a capacity of 80,000 ~~tons.~~ lbs. (R. 56.) The average capacity of steam-railroad freight cars is about 80,000 ~~tons.~~ lbs. (R. 55.)

Appellee's passenger equipment consists of 182 units, of which 150 are equipped with motors and 32 are operated as trailers. (R. 56.) Nine of these are dining cars and 5 observation parlor cars. (R. 56.) The passenger cars are somewhat shorter and narrower than those of any steam railroad passenger cars shown of record. (R. 56.)

Appellee has on file with the Interstate Commerce Commission a total of 221 effective powers of attorney and concurrences issued by it. (R. 57.) It publishes 16 local freight tariffs and participates as initial carrier in 206 freight tariffs and as a delivering or intermediate carrier in more than 800 freight tariffs, thus providing freight rates in conjunction with steam railroads to and from practically every State and points in Canada and Mexico. (R. 57.) It sells through railroad and Pullman tickets to any part of the United States, Canada, and Mexico, and published tariffs permit it to sell passenger tickets for trips around the world. (R. 57.) It publishes its freight and passenger tariffs through the same agents used by all steam railroads and many of its rates and those of steam roads are published in the same joint tariffs. It assesses its local passenger fares upon the same

per-mile basis used by all steam railroads, namely, 3.6¢ per mile. (R. 57.) It publishes in its train schedules connections with the trains of all steam lines, motor bus, and electric lines at both Chicago and Milwaukee, including all the transcontinental roads. (R. 58.)

Appellee operates, via its Skokie Valley line, about 20 fast or through passenger trains daily in each direction between downtown Chicago and downtown Milwaukee. (R. 57.) Their running time is about 1 hour 45 minutes, equaling the fastest trains of the Chicago & North Western, which operates 15 through trains daily between Chicago and Milwaukee. (R. 57.) Appellee and the Chicago & North Western are in direct competition with each other in their through passenger service, their limited service to Waukegan, and their suburban and commuter service. (R. 57.) Appellee added dining cars to its through Chicago-Milwaukee service to compete with the Chicago-Milwaukee passenger service of the Chicago & North Western and the Chicago, Milwaukee, St. Paul & Pacific. (R. 58.) Appellee's passenger service and fares are subject to the jurisdiction of the Interstate Commerce Commission. (R. 58.)

Appellee is a member or associate member of the following regular steam-railroad organizations: American Railway Association, Western Passenger Association, Bureau for the Safe Transportation of Explosives, and Western Weighing and Inspection Bureau. (R. 60.) It is also a sub-

scriber to the following codes or rules entered into by steam railroads generally: Code of Car Service Rules, Code of Per Diem Rules, Car Service and Per Diem Rules Agreement of the American Railway Association, Master Car Builders' Rules, Interchange Agreement of the American Railway Association, Official List of Open and Prepay Stations, and Consolidated Freight Classifications. (R. 60.) It operates its trains under rules substantially similar to the Standard Code of Train Rules of the American Railway Association. (R. 59.) Its bills of lading, waybills, and interline waybills are the same as those used on steam railroads generally. (R. 60.) Its departmental organization is similar to that of steam railroads. (R. 61.)

Appellee's total transportation revenue in 1930 was $6,091,402.59, of which about 76% was from passenger traffic and about 22% from freight traffic. (Gov. Ex. 18, R. 33.) In each of the four preceding years its transportation revenue was over $7,000,000, and the percentage thereof derived from passenger and freight traffic, respectively, was substantially the same as in 1930. (*Ibid.*) In 1930, 87% of its carload freight traffic was interchanged with connecting steam railroads and about 78% of all its freight traffic was interline, but only about 42% of its freight revenue was derived from interline business. (Gov. Exs. 18, 22, R. 33, 35; R. 59.) In September, 1930, it interchanged carload freight traffic with 69 different steam rail-

roads and with 31 different private car companies. (R. 59.) No cars containing less-than-carload freight are interchanged with steam railroads, but about 15% of its less-than-carload freight is interchanged. (Gov. Ex. 21, R. 34; R. 59.) Class I steam railroads of the United States derive about 15% of their total revenues from passenger traffic and about 77% from freight traffic, and (in 1928) about 65% from interline freight traffic. (R. 60–61.)

As of April 30, 1931, there were outstanding in the hands of the public securities issued by respondent and its predecessors of a par value of about $43,000,000, all but $4,000,000 of which were issued since March 1, 1920. (R. 62.) All of these securities were issued under the authority of and with the approval of the regulating commissions of Illinois and Wisconsin. (R. 62.) All securities issued by appellee since March 1, 1920, have been reported to the Interstate Commerce Commission as having been issued under the authority of these commissions. (R. 62.)

Appellee is not operated as a part of any steam railroad system of transportation. (R. 62.) In Milwaukee and Waukegan it furnishes street-car service. (R. 58.) This service is separate and distinct from its other passenger service, different equipment is used, and the local fares are governed by special State tariffs. (R. 58.)

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In entering a decree dismissing the petition for want of equity.

(2) In holding that appellee is an "interurban electric railway."

(3) In holding that appellee is not a "carrier" or "corporation" within the meaning of those terms as defined in Section 20a of the Interstate Commerce Act, and is therefore excluded from the provisions of Section 20a of that Act.

(4) In failing and refusing to hold that appellee is a "carrier" as that term is used in said Section 20a, and in failing to hold that appellee is subject to the provisions and requirements of said Section 20a.

(5) In failing and refusing to enter an injunction as prayed for by the United States.

SUMMARY OF ARGUMENT

Sections 1 (22) and 20a of the Interstate Commerce Act were integral parts of the new policy adopted by Congress when it enacted the Transportation Act, 1920. The purpose of that Act was to foster an efficient national system of railroad transportation. It is submitted that the words "interurban electric railway" had the same meaning in Section 20a as in Section 1 (22). To ascribe a different meaning to these words as used in each section would be an undue refinement of inter-

pretation and would lead to further uncertainty as to the scope and application of the Act.

In *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, this Court held that the electrically operated railroad there involved was not an "interurban electric railway" within the meaning of Section 1 (22). A comparison of the operations of the railroad involved in that case with those of appellee shows that appellee is a carrier within the letter and purpose of the Interstate Commerce Act in even a more substantial sense than was the former railroad, and that appellee falls within the class of carriers "long recognized as objects of national concern and regulation" and is not a "street, suburban, or interurban electric railway" within the meaning of the latter phrase as used in Section 20a.

A carrier does not have to be predominately a freight-carrying system in order to be a substantial factor in the business of interstate transportation by railroad. If this were otherwise, the operations of such an important carrier as the Long Island Railroad would be excluded from the control of the Interstate Commerce Commission under Sections 1 (18) and 20a of the Interstate Commerce Act, and clearly no such result was intended by the exclusion of interurban electric railways from those sections. Appellee has been held to be a railroad company with power to condemn land for railroad purposes under the laws of Illinois, (*Chicago North Shore &*

Milwaukee Railroad Co. v. *Chicago Title & Trust Co.*, 328 Ill. 610, 615–616.) Congress has described appellee as a "railroad corporation" in granting it an easement over a military reservation subject to reversion to the Government if the easement be used "for any other than railroad purposes." (42 Stat. 622.)

ARGUMENT

APPELLEE IS SUBJECT TO THE PROVISIONS OF SECTION 20A OF THE INTERSTATE COMMERCE ACT

Paragraph (18) of Section 1 of the Interstate Commerce Act requires carriers subject to the Act to obtain a certificate of public interest and convenience from the Interstate Commerce Commission before extending their lines or constructing new lines. Paragraph (22) of Section 1 exempts from the authority conferred by paragraphs (18) to (21) of this section "street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Section 20a requires carriers subject to the Act "(except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation)" to obtain from the Commission an order of authorization before issuing any securities or assuming certain obligations. The section provides that the

Commission shall make such order only if it finds that such issue or assumption is "compatible with the public interest," "consistent with the proper performance by the carrier of service to the public as a common carrier," and "will not impair its ability to perform that service."

Both Section 20a and paragraphs (18) to (22) of Section 1 were added to the Interstate Commerce Act by the Transportation Act, 1920. The regulatory authority conferred by these sections is, in part at least, supplementary, both being designed to prevent harmful duplication of facilities and impairment of carrier credit. Where a railroad has sufficient funds in hand to start new construction, control over security issues would not alone adequately protect the public interest. On the other hand, where a carrier, as a first step in a program of expansion, issues securities to finance the project, the public interest requires that this preliminary step be within the control of the Commission. This Court has frequently referred to the regulatory power given by these sections as integral parts of the new policy adopted in the Transportation Act of fostering an efficient national system of railroad transportation.

Railroad Commission v. *Southern Pacific Co.*, 264 U. S. 331, held that a State Commission could not, upon the facts there presented, require railroads to construct a new union station until the

same had been authorized by the Interstate Commerce Commission under paragraphs (18) to (21) of Section 1 (Section 402 of the Transportation Act). The Court there said (p. 347):

> The purpose of Congress to prevent interstate carriers from incurring expense which will lessen their ability to perform well their interstate functions is further shown in § 439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of § 20a. This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds or other evidence of indebtedness * * *. This is of course *in pari materia* with the restriction of paragraph 21 of § 402 to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties.

In *Dayton-Goose Creek Railway Co.* v. *United States,* 263 U. S. 456, which upheld the constitutionality of the recapture provisions of Section 15a (which section also authorized the Commission to establish rates for carriers as a whole or in territorial groups), the Court said (p. 478):

> The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to

> maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

We therefore submit that the words "interurban electric railway" have the same meaning in Section 20a as in Section 1 (22). They are used in the same context in parts of the Act having a similar purpose. To ascribe different meanings to these words would seem to be an undue refinement of interpretation and would lead to further uncertainty as to the scope and application of the Act.

In *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, *supra*, this Court held that not every railroad operated by electricity between cities was an electric interurban railway within the meaning of Section 1 (22). After referring to the emphasis placed by the carrier upon the aptness of these words as descriptive of its railway, the Court said (p. 306):

> But this literal application is inconclusive, for it ignores the entire phraseology employed, which is, "street, suburban, or interurban electric railways." * * * The descriptive adjectives show that Congress had in mind a class of carriers differing essentially from those long recognized as the objects of national concern and regulation.

The Court, without laying down any general rule, held that the Piedmont & Northern was not an electric interurban railway within the meaning of Section 1 (22). It becomes pertinent, therefore, to compare the operations of that carrier with those of appellee.

In length of line and in total revenues appellee is the more important carrier. Appellee's line from Chicago to Milwaukee is over 100 miles in length (*supra*, p. 4); the main line of the Piedmont & Northern is less than 90 miles.[1] The total distance of the former's lines is about 138 miles (*supra*, p. 3) compared with about 128 miles of lines for the latter.[1] For the year 1926 the former had operating revenues of about $7,200,000 (Gov. Ex. 18, R. 33); the latter's operating revenues for that year were about $2,500,000.[2]

From the point of view of tariffs published and concurred in and of membership in traffic organiza-

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[1] *Piedmont & Northern Ry. Co.* v. *United States*, 30 F. (2d) 421, 422.

[2] *Piedmont & Northern Ry. Co.* v. *United States*, *supra*, p. 429.

tions, both carriers are national in scope. The former participates as initial carrier in 206 freight tariffs and as a delivering or intermediate carrier in more than 800 freight tariffs (R. 57); the latter is a party as initial carrier to 184 general tariffs and as participating carrier in 364 tariffs published under powers of attorney given to the steam railroads (286 U. S. 299, 309). These tariffs embrace the entire country and parts of Mexico and Canada. (*Ibid.*) Both carriers are members of steam railroad traffic organizations. (*Supra*, p. 9; *Proposed Construction by Piedmont & Northern Ry.*, 138 I. C. C. 363, 370.) In addition, both carriers connect and tie in with street railway systems in cities and towns on their systems (R. 49–50; 286 U. S. 299, 308), and both carriers closely parallel the line of one or more steam railroads (R. 58; 138 I. C. C. 363, 372).

We conceive that the principle to be deduced from the decision of this Court in the *Piedmont & Northern case* is that when the volume of a carrier's interstate business is such as to constitute it an important competitor, on substantially equal terms, with interstate steam railroads, it falls within the class of carriers "long recognized as objects of national concern and regulation" and is not a "street, suburban, or interurban electric railway" exempted from the regulatory provisions governing extensions and abandonments of lines and security issues. It would seem clear that a carrier

does not have to be predominantly a freight-carrying road in order to be a substantial factor in the business of interstate transportation by railroad. Appellee's annual freight revenue of over $1,300,000 is not of any less importance from the standpoint of national regulation because its passenger revenue is more than three times greater.

In the matter of passenger traffic, appellee furnishes the same character of service as that of its steam-railroad competitors. Between the important cities of Chicago and Milwaukee its running time is the same or better, it runs a greater number of trains, and it provides parlor observation cars, dining cars, and the usual station facilities. (*Supra,* pp. 6, 9.) During September, 1930, appellee sold interline tickets for transportation via 50 different steam railroads, 2 steamship lines, 2 air lines, and 1 motor-coach line to points in 38 different States, the District of Columbia, and Canada, and during that period tickets were sold to points on its line by 35 steam railroads from points ranging from Massachusetts to California. (Gov. Ex. 24, R. 36–37.) In September, 1930, over 50% of its passenger revenue was from ticket sales between Chicago stations and the cities of Waukegan, Illinois, and Kenosha, Racine and Milwaukee, Wisconsin. (Gov. Ex. 23, R. 35.) Applying this percentage to the figures for the year 1930 shows a revenue of over $2,300,000 from passenger traffic between Chicago and these cities, and for the year 1926 this revenue would be over

$2,850,000, or substantially the amount of the entire freight revenue of the Piedmont & Northern for the year 1926.[3]

The freight revenue of the Long Island Railroad Company in 1928 was $11,605,000, its passenger revenue $26,460,000, and its total railway operating revenue $40,532,000.[4] It would scarcely be contended that this important carrier, if completely electrified, would not be subject to Sections 1 (18) and 20a of the Interstate Commerce Act because only about 28% of its operating revenue was from freight traffic. (See *Transit Commission* v. *United States,* 284 U. S. 360.)

The interrelation between appellee's intrastate and interstate traffic is shown by the fact that it has twice applied to the Commission alleging that intrastate rates imposed by State authority caused unjust discrimination against interstate commerce or undue prejudice to persons or localities in interstate commerce, in violation of paragraph (4) of Section 13 of the Interstate Commerce Act, as added by the Transportation Act, 1920. In both cases the Commission found that the intrastate rates caused unjust discrimination against interstate commerce, as well as undue prejudice, and raised the intrastate rates to the level of the inter-

[3] *Piedmont & Northern Ry. Co.* v. *United States, supra,* p. 429.

[4] *Long Island Railroad Company Abandonment,* 162 I. C. C. 363, 368.

state rates in order to remove this unjust discrimination and undue prejudice. *Intrastate Fares of the Chicago North Shore & Milwaukee Railroad within the State of Illinois,* 62 I. C. C. 188, 193; *Intrastate Fares of the Chicago North Shore & Milwaukee Railroad within the States of Illinois and Wisconsin,* 136 I. C. C. 165, 168. In the former case the Commission said (pp. 192–193):

> As tending to show that it is not a street railway in its interurban operations, petitioner relies upon the fact that it operates daily upward of 40 limited trains between Chicago and Milwaukee and 96 express trains between Chicago and Waukegan; that this service is practically doubled on Saturday afternoons, Sundays, and holidays; that intrastate passengers travel on its express trains side by side with interstate travelers; that its interurban cars are used interchangeably in intrastate and interstate service and are heavier and larger than ordinary street cars; * * * that whatever the character of the original franchises granted to petitioner's predecessors, petitioner's line is now operated under the general railroad laws of Illinois and has been so operated since 1902, when its predecessor, the Chicago & Milwaukee Electric Railroad Company, was organized; that petitioner's status as a railroad engaged in general transportation has been specifically recognized by ordinances of the municipalities which it serves

and by formal order of the state of Illinois; and that this is the first time in any proceeding that its status as such a railroad has been questioned.

Appellee maintains freight depots used exclusively for receiving and delivering freight at several of its stations. (R. 54.) At Milwaukee there is a brick freight station and at Evanston, Illinois, a brick freight depot used jointly with the Chicago, Milwaukee, St. Paul & Pacific Railroad. (R. 54.) Appellee's trains are operated under train orders, clearance cards, "meet" orders, changes in orders, rules as to superior and inferior trains, and in many other details as are trains of steam railroads. (R. 59.) Train despatching is done by telephone. (R. 59.)

Its advertisements present to the public its facilities for handling carload freight. Government Exhibit 46 (consisting of 5 advertisements by appellee during 1930 and 1931 in "The Traffic World" and filed (R. 16) as an original exhibit as part of the record in this Court) calls attention to its facilities for handling carload freight from points south, east, or southeast of Chicago when destined to points in the north or northwest by routing to appellee's line through three connections so as to avoid congestion in Chicago freight yards. The reverse routing on traffic moving southbound is stated to be equally effective. A typical statement on Sheet 1 reads:

> The North Shore Line maintains heavy duty electric equipment operating over standard rails and roadbed for the prompt handling of this carload business.

In 1930 about 78% of appellee's freight tonnage was interline traffic and only 10% of its freight tonnage was less-than-carload freight. (Gov. Ex. 21, R. 34.)

Appellee has been held to be a railroad company under the laws of Illinois, with power to condemn land for railroad purposes. *Chicago North Shore & Milwaukee R. R. Co.* v. *Chicago Title & Trust Co.*, 328 Ill. 610, 615–616. By an act approved June 6, 1922 (42 Stat. 622), Congress granted appellee, which was described as a "railroad corporation organized and existing under and by virtue of the laws of the State of Illinois," a perpetual easement "for railroad purposes" over a military reservation, subject to the proviso that the easement should not be used "for any other than railroad purposes," and that when it should cease to be so used it should revert to the United States.

We submit that the facts set forth in the findings of the District Court do not support its statement that the Interstate Commerce Commission "by its failure to act, and by affirmative recommendations in its annual reports to the Congress of the United States, has given to respondent by contemporaneous construction the status of an interurban electric railway." (R. 63.) The court then quotes from the Commission's annual report

for the year 1921, which it states was repeated in its annual reports for the years 1922 to 1925, inclusive. The substance of the recommendation is:

> It seems desirable that section 20a of the interstate commerce act be so amended as to indicate definitely the classes of electric railway companies subject to that section. (R. 63.)

This shows that the Commission thought that Section 20a needed clarification, but that it was of the opinion that some electric railroads might be subject to Section 20a. The quotation from the annual report for the year 1929 recommends an amendment to Section 20a which would make the jurisdiction over electric railways under that section similar to the jurisdiction over electric interurban railways under Section 15a.

The court states that appellee has on two occasions been informed by certain officials of the Commission that, unless it were advised to the contrary, it need not file returns relating to recapturable income under Section 15a. (R. 63–64.) The excepting clause as to electric railroads in Section 15a differs from the exception in Section 20a. In *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission, supra,* this Court said (p. 312) with reference to similar administrative rulings relied upon by the carrier:

> Only a word need be said with respect to the contention that governmental agencies have heretofore classified the railway as an

interurban electric line. It is true that in connection with quite diverse administrative functions the United States Labor Board, the Postmaster General, and the Interstate Commerce Commission have classified petitioner's railway as an interurban electric line in distinction to steam railroads. Neither the administrative nor the statutory classification has, however, been uniform, and in any event is not controlling in this litigation.

CONCLUSION

It is respectfully submitted that the decree below should be reversed with directions to issue an injunction as prayed for in the petition.

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The Assistant to the Attorney General.
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Special Assistants to the Attorney General.

DECEMBER, 1932.

APPENDIX

Sec. 12 (1) of the Interstate Commerce Act, as amended, provides in part as follows:

> That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof * * *. (C. 104, 24 Stat. 383; C. 128, 26 Stat. 743; C. 91, 41 Stat. 484; U. S. C., Title 49, Sec. 12 (1).)

Sec. 20a of the Interstate Commerce Act, as amended, provides in part as follows:

> (1) That as used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or inter-

urban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * * * *

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

* * * * *

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, such person may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed

the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the Commission's order or orders in the premises, or any application not authorized by the Commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court. (C. 91, 41 Stat. 494–496; U. S. C., Title 49, Sec. 20a.)

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